

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
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Amendment to the Commission's Rules
Regarding a Plan for Sharing
the Costs of Microwave Relocation

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WT Docket No. 95-157
RM 8643

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PETITION FOR RECONSIDERATION AND CLARIFICATION

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PETITION FOR RECONSIDERATION AND CLARIFICATION

Omnipoint Communications, Inc. ("Omnipoint"), by its attorneys and pursuant to Section 1.429 of the Commission's rules, files this petition for reconsideration of the Commission's First Report and Order¹ (the "R&O"). While Omnipoint commends the Commission for adopting a microwave relocation cost allocation scheme that generally spreads costs in an equitable manner, Omnipoint requests reconsideration/clarification of three aspects of the R&O: (1) the Commission failed to consider why Omnipoint, as a small business operating with a Block A license, should not be treated like other small businesses under the cost-allocation scheme; (2) microwave incumbents seeking cash windfalls during the mandatory negotiation period should not be viewed as negotiating in good faith; (3) the costs of relocating microwave links that are not within the licensed PCS band should be deemed "premiums" to the incumbent, and should not be considered costs of removing an interfering link.

On reconsideration, the Commission should clarify that Omnipoint should be treated like other small businesses under the cost recovery scheme. Further, the Commission should make it clear that it will not tolerate delays in mandatory negotiations by microwave incumbents seeking

¹ Amendment to the Commission's Rules Regarding a Plan for Sharing the Costs of Microwave Relocation, First Report and Order and Further Notice of Proposed Rule Making, WT Dkt. No. 95-157, RM-8643, FCC 96-196, 61 Fed. Reg. 29679 (June 12, 1996).

excessive cash payments. Finally, the Commission should clarify that microwave links operating outside of the broadband PCS spectrum (1850-1990 MHz) are not interfering links, and so the costs of relocation of such links should be deemed "premiums."

I. Omnipoint is Entitled to Pay its Obligations Under the Cost Recovery Mechanism As a Small Business

At ¶ 43 of Appendix A of the R&O, the Commission decided that entrepreneurs should be entitled to pay for their relocation cost-sharing obligations in installments under the same terms as their auction payment obligations "because allowing such payments will significantly ease the burden of cost-sharing for these entities." Because UTAM also faces access to capital constraints, the Commission found that UTAM may pay its obligations under the cost-sharing plan according to a five-year plan, at an interest rate of prime plus 2.5 percent. Omnipoint continues to support the Commission's efforts to ease the costs of microwave relocation imposed on small businesses and on UTAM. However, the R&O fails to address arguments raised by Omnipoint in its comments and reply comments that, as a small business operating the Block A New York MTA license, Omnipoint should be entitled to treatment similar to other small businesses and to UTAM.²

Allowing small businesses like Omnipoint an installment payment plan strengthens the Commission's overarching policy commitment, set forth by Congress, to foster legitimate and lasting small business participation in PCS.³ As the Commission pointed out in the Fifth Report and Order, 9 FCC Rcd. 5532-5572-73 ¶ 96 (1994), "because broadband PCS licenses in many

² We note that the Commission itself, by accepting Omnipoint's short-form application to bid and its 18 long-form Block C license applications filed by an Omnipoint affiliate, has confirmed that Omnipoint is unequivocally a broadband PCS "small business."

³ See 47 U.S.C. § 309(j)(4)(D); Sixth Report and Order, PP Dkt. No. 93-253, 11 FCC Rcd. 136, ¶ 1 (1995).

cases are expected to be auctioned for large sums of money in the competitive bidding process, and because build-out costs are likely to be high, it is necessary to do more to ensure that designated entities have the opportunity to participate in broadband PCS than is necessary in other, less costly spectrum-based services." The same policy concerns which motivated the Commission to extend installment and other payment mechanisms to Block C and F small businesses apply with equal force to Omnipoint as a Block A licensee. Indeed, Omnipoint's need for small business consideration is even more acute because its MTA license requires it to raise additional capital beyond that necessary for any BTA licensee. Further, the payment terms established under GATT, especially the five-year installment term and the interest rate of 7.75%,⁴ make Omnipoint's license payments relatively more onerous than the Commission's generous 10-year installment plans offered to either Block C or F licensees. Basic fairness and consistency with the Commission's commitment to promote entrepreneurs dictates that Omnipoint should be entitled to small business status under the cost-allocation plan for Omnipoint's deployment in the New York MTA.

The fact that Omnipoint, as a small business, undertakes to serve the entire New York MTA only underscores the need for the Commission to treat Omnipoint the same way it treats other small businesses; as a small business, Omnipoint faces the same lack of access to capital difficulties as all other PCS small businesses, regardless of whether it holds a Block A, C, or F license. Indeed, the decision to permit UTAM to pay under an installment payment plan, while it certainly never qualified as a "small business" or to hold Block C and F licenses, bears out that the Commission's purpose is to ease the burdens of the cost allocation mechanism for entities that are less able to afford it, not simply for holders of Block C or F licenses. While Omnipoint

⁴ In the Matter of American Personal Communications, et al., Order, FCC 96-94 (rel. March 11, 1996), *recon. pending* ("Payment Order"). On April 10, 1996, Omnipoint filed a petition seeking reconsideration of the Payment Order.

continues to support installment payments for UTAM and legitimate PCS small businesses, the Commission unfairly discriminated against Omnipoint -- a recognized small business -- while it gave full consideration to UTAM's lack of access to capital problems.

At a minimum, Omnipoint should be entitled to pay its obligations under the cost-allocation plan on the same terms as its five-year installment plan for the payment of its license obligation. Unlike other Block A or B licensees, the broadband PCS pioneers fulfill their payment obligation for the MTA license according to the five-year payment established by the Payment Order. Because the R&O tracks a small business licensee's payment of its cost-sharing obligation with its license payment obligations, it is only fair that Omnipoint should be entitled to pay its cost-allocation obligations under the same five-year plan as its license payments.⁵

II. Requests for Cash Windfalls During the Mandatory Period Should Be Deemed Evidence of Bad-Faith Negotiation

As Omnipoint and other PCS providers explained in the initial comments and reply comments, many microwave incumbents continue to abuse the relocation process and their public interest obligations as FCC licensees by holding up the transition of 2 GHz spectrum to commercial PCS use with demands for exorbitant fees and payoffs beyond the full costs of relocation. This not only harms PCS operators who have paid billions to the government for the

⁵ In granting Omnipoint's license, the Commission noted that: "[t]he legislative history [of GATT] indicates that payment of the principal and interest [of Omnipoint's New York MTA license payment] should be 'in a manner consistent with the installment payment rules adopted by the Commission as part of its general competitive bidding regulations.'" In the Matter of American Personal Communications, et al., Memorandum Opinion and Order, 10 FCC Rcd. 1101, 1102 (1994), *quoting*, H. Rep. No. 826, Part 2, 103d Cong., 2d Sess. 8 (1994). Further, the Commission has interpreted GATT, and its legislative history, to refer to the "small business" general competitive bidding rules at 47 C.F.R. § 1.2110(e). Payment Order at ¶ 7.

right to operate on the PCS spectrum,⁶ it harms the American public and industry even more because it slows the progress toward a competitive local telecommunications market. We were disappointed by the Commission's decision, at ¶ 13 of the R&O, not to modify the voluntary negotiation period.

However, the Commission can significantly reduce some of the problems in the future, as the negotiations enter the mandatory period, by clarifying that it is a bad faith request for the microwave incumbent to demand a cash windfall over and above all costs of relocation to comparable facilities. We note that at ¶ 21 of the R&O the Commission states that it will evaluate the good-faith nature of demands for premiums according to "the type of premium requested (e.g., whether the premium is directly related to relocation . . .)." In the context of voluntary negotiations, the Commission explained that "[p]remiums could include: replacing the analog facilities with digital facilities, paying all of the incumbent's transactions costs, or relocating an entire system as opposed to just the interfering links." Id. at ¶ 15. A demand for a cash payment, which is not directly related to any costs of relocation or reasonable negotiating costs, appears to be well beyond what the Commission would perceive as a legitimate "premium."

Especially during the mandatory period, when hopefully all relocation disputes will be resolved, it is important to have clear outer limits on what is permissible, both to expedite the negotiation process itself and to avoid disputes at the Commission. Therefore, Omnipoint believes the Commission should clarify that it is not good faith negotiating for a microwave incumbent to request a cash payment in addition to all relocation costs. For example, requests such as that of Suffolk County, for Omnipoint to give it an \$18 million cash payment as a

⁶ While some may claim that bidders in the PCS auctions know or should know that microwave incumbents have rights to operate prior to the time they are relocated, no operator can realistically forecast that some incumbents will hold out for outrageous premium pay-offs.

"revenue inducement" for relocation, in addition to moving its entire system from analog to digital facilities, should be prohibited during the mandatory period. *See*, Comments of Omnipoint Communications, Inc., WT Dkt No. 95-157 at 6 (Nov. 30, 1995).

III. Premiums Include Relocation Of All Microwave Links That Are Not Located Within the PCS Spectrum

Omnipoint requests that the Commission clarify that relocation of a microwave incumbents' links not within the licensed broadband PCS spectrum (1850-1990 MHz) should be deemed a "premium," and not a relocation that is required under the Commission's rules. While this point may seem self-evident to most objective observers, some microwave incumbents and their negotiators have insisted that the Commission's rules *require* Omnipoint to relocate microwave links that are outside of the licensed PCS band, and even links in the 2.1 GHz band. Omnipoint believes that the cost of relocating such links should properly be considered a "premium," and not an FCC obligation of the PCS licensee.

The R&O is fully consistent with this position. For example, the Commission notes that "[p]remiums' could include: . . . relocating an entire system as opposed to just the interfering links," R&O at ¶ 15, and, "system-wide relocations." Id. at ¶ 21. If system-wide relocation of links that are not co-channel with the relocater's PCS spectrum is a premium, such relocation is an inducement to relocate expeditiously and not requirement under the Commission's rules. The cost allocation method adopted in the R&O, which requires reimbursement by a subsequent PCS operator only when "all or part of the microwave link was initially co-channel with the [operator's] PCS band," id. at Appendix A, ¶ 32, is further evidence of this basic tenet of the relocation process. *See also* 47 C.F.R. § 24.237(a) ("All [PCS] licensees are required to coordinate their frequency usage with the co-channel or adjacent channel incumbent fixed microwave licensees in the 1850-1990 MHz band.").

The Commission should clarify this issue to end further confusion (or obfuscation) on the part of microwave incumbents as to their rights vis-a-vis PCS operators which, in turn, should expedite on-going negotiations and prevent unwarranted disputes between the parties.

Conclusion

Omnipoint urges the Commission to amend and clarify its R&O, as discussed above, to make the microwave relocation and cost-allocation and processes more equitable for all participants.

Respectfully submitted,

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